No. 16,317 / Vol. 3104

In the

United States Court of Appeals

For the Ninth Circuit See Also 3103

George J. Towle and Fred George, individually and as copartners doing business as Towle-George Turkey Log Company, also known as Towle Food Products Co., a partnership,

Appellants,

vs.

Norbest Turkey Growers Association, a corporation,

Appellee.

Appellee's Answering Brief

Edward J. Ruff
Ira A. Brown, Jr.
Thelen, Marrin, Johnson & Bridges
111 Sutter Street
San Francisco 4, California
Attorneys for Appellee

Harry D. Pugsley
Continental Bank Building
Salt Lake City 1, Utah
Of Counsel

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

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No. 16,317

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GEORGE J. TOWLE and FRED GEORGE, individually and as copartners doing business as TOWLE-GEORGE TURKEY LOG COMPANY, also known as TOWLE FOOD PRODUCTS Co., a partnership,

Appellants,

vs.

NORBEST TURKEY GROWERS ASSOCIATION, a corporation,

Appellee.

Appellee's Answering Brief

Appellants' Opening Brief (pp. 1-2) characterizes the action as one in which appellants sought to recover losses resulting from appellee's "extension of credit in violation of an agency agreement existing between the parties." This statement is correct only in so far as it means that appellants in their complaint and at the trial were claiming that appellee, Norbest Turkey Growers Association (hereinafter called "Norbest"), violated an agency which resulted from specific instructions to ship material only on a sight draft bill of lading basis as distinguished from invoicing

on an open account basis. The metamorphosis which has taken place in the instant case will be considered at length in appellee's Statement of the Case. As is the case in Appellants' Opening Brief, all references to the record will be "(R. ....)."

JURISDICTION

Appellee agrees with the statement of jurisdiction of both the trial court and this Court as found on page 2 of Appellants' Opening Brief.

STATEMENT OF THE CASE

Questions Presented.

The basic questions in the case are entirely factual. These are: "What agency was created and what instructions or authority were given to Norbest by appellants in creating the agency, and did Norbest comply with those instructions and the terms of the agency?

Summary.

The very obvious moral of this case is that it does not pay to do a favor for a friend. A very short summary of the facts at the outset, before considering them in detail, will be helpful.

On or about May 25, 1954, appellants, a co-partnership, agreed in writing to buy 190,000 pounds of a product known as turkey logs from appellee, Norbest, on or before August 1, 1954, at an ultimate price of 95¢ a pound. Thereafter, appellants entered into an agreement to sell these same turkey logs to Towle Food Products Inc., also known as Turkey Log Corporation of Illinois (hereinafter called "the Illinois corporation"), on or before August 1, 1954, for $1.05 a pound. These were entirely separate agreements.

From time to time appellants did withdraw some of these turkey logs from storage for which they were invoiced by

Norbest at 95¢. Appellants then ordered the transfer of these same turkey logs to the Illinois corporation and in turn invoiced the Illinois corporation directly for their own account at $1.05.

On July 22, 1954, one of the appellants first wrote Norbest to the effect that he was going to Europe on a vacation trip with his wife and asked as a favor if Norbest would be willing to "invoice" (Pl. Ex. 8, R. 123-4) the Illinois corporation directly while he was gone rather than having the Illinois corporation pay him and then have him pay Norbest. Since the Illinois corporation was paying appellants $1.05 a pound for the product and appellants were only paying Norbest an ultimate 95¢ a pound, appellant also asked if Norbest would be willing to credit the difference at the proper time and pay over the credits whenever they accumulated to appellants' bank.

Norbest was to receive nothing for extending this favor, but it nevertheless, after some correspondence, wrote appellants on August 6, 1954, indicating it would be glad to "bill" the Illinois corporation at $1.05 a pound and credit appellants with the difference (Pl. Ex. 17, R. 133-4). At a meeting held in Salt Lake City on August 10, 1954, between Norbest, appellants, and the Illinois corporation it was orally agreed that Norbest would invoice the Illinois corporation directly at $1.05 a pound, that transfers of the product would be made directly by Norbest to the Illinois corporation, and that after Norbest had been paid in full at its price of 95¢ a pound, any credits resulting from the difference in price between 95¢ and $1.05 would be paid over to appellants (Finding VIII, R. 38-9—this portion of the finding is not controverted and is not assigned as error). On August 12, 1954, Mr. Towle, one of appellants, wrote his office and advised that the Illinois corporation had agreed to be "invoiced" (Def. Ex. A, R. 146).

Norbest followed these instructions to the letter; however, the Illinois corporation refused to pay Norbest at the $1.05 price and paid only at the 95¢ price because of legal problems between appellants and the Illinois corporation (Pl. Ex. 15, R. 137-8) with the result that no credits accrued to appellants.

When appellant Towle returned from Europe in October 1954, he found this out and tried to get the Illinois corporation to do something about it, with no success. He also saw Norbest. He mentioned nothing to either Norbest or the Illinois corporation about any failure to use sight draft bills of lading.

Approximately one year later, and for the first time, appellants took the position with Norbest that it shouldn't have invoiced the Illinois corporation because it had been instructed to ship everything sight draft bill of lading and that as a result Norbest was liable for the 10¢ a pound differential which it had not collected. It is rather obvious that if Norbest had not undertaken to perform this favor for appellants, this lawsuit would never have resulted.

The case thus began and was tried as one in which appellants charged that they had created Norbest their agent with specific instructions to ship material on a sight draft bill of lading basis only and that appellee had violated those instructions by invoicing and shipping on open account (Complaint, para. 13, R. 7; para. 15, R. 7; para. 17, R. 8; para. 22, R. 10; para. 23, R. 10; para. 31, R. 12-13; para. 32, R. 13; para. 33, R. 13). Appellants now on appeal, having failed to satisfy the trial court that there were any such instructions to ship sight draft only, have decided to retreat from that position. They now say that even though there were no such instructions there was also *no agreement* or authorization to invoice on open

account (this last is completely contrary to Findings VII and VIII, R. 37-9, which are fully supported by the evidence), that it was therefore appellee's obligation to establish a right to invoice, and that it failed to sustain that burden (Appellants' Brief, pp. 32-51). Another assumption they make is that the agency which was created was to carry out or perform existing contracts which the partnership had with the Illinois corporation (Appellants' Brief, pp. 57-61).

All of these contentions beg the question. The fact which appellants ignore, which disposes of the whole case, is that it was up to appellants, who pleaded the agency in the first place, to establish its existence and its terms. The trial court, acting as the finder of disputed facts, found that the agency which was created was one under which it was *agreed* that Norbest was to ship "directly to" Illinois, "to invoice the Illinois corporation directly at $1.05 per pound," and to receive funds from the Illinois corporation (Finding VIII, R. 38-9). It is undisputed that Norbest did just this. That establishes the terms of the agency and ends the case. There is no need to speculate as to what the rules would be or who would have the burden of proof in case of a different type or kind of agency. We are concerned with the agency established by agreement of the parties in this case.

The Evidence.

In their attempt to bring themselves within a nonexistent factual situation, appellants have ignored or misstated certain crucial facts and findings. Because of these misstatements, appellee deems it imperative, in fairness to this Court, to restate the facts of the case in accordance with the evidence and the findings of fact made by the trial court as it sees them, and thus dispose of certain

of the more glaring deficiencies in appellants' statement.

The parties to this case are co-partners Fred George and George Towle, variously referred to as Towle Food Products Co. and Towle Mfg. Co. (hereinafter referred to as "George" and "Towle"), who are the plaintiffs-appellants, and the Norbest Turkey Growers Association, which is defendant-appellee. The controversy concerns generally the purchase of a product known as turkey logs by Towle and George from Norbest and the sale of these same turkey logs by Towle and George to the Illinois corporation. A turkey log is a round cylinder of pressed boned turkey meat generally prepared for institutional use (R. 52).

On May 25, 1954, Towle, acting for and on behalf of the partnership, agreed in writing (Pl. Ex. 4, R. 14-16, 117) to purchase approximately 190,000 pounds of turkey logs from Norbest in lots of 10,000 pounds or more at a price of 99¢ per pound, to be paid upon taking delivery, and to purchase and pay for the entire amount of these turkey logs on or before August 1, 1954. After 100,000 pounds had been delivered and paid for, the partnership was to receive a credit of 4¢ per pound on these 100,000 pounds; and the balance of the approximately 190,000 pounds was to be paid for at 95¢ per pound. Up to August 10, 1954, Norbest shipped to or for the account of the partnership entirely on open account and invoiced the partnership when it placed an order for turkey logs. The partnership would advise Norbest of orders it had received from the Illinois corporation and request shipment (R. 57). Norbest then invoiced the partnership. Norbest never received cash from or for the account of appellants before the turkey logs were in fact shipped or delivered, except only in instances in which the Illinois corporation specifically requested the partnership to make sight draft shipment to its customer and the partnership in turn specifically requested Norbest to handle it on this basis (R. 60-61).

On June 10, 1954, the partnership agreed in writing (Pl. Ex. 6, R. 16-22, 121) with the Illinois corporation to sell to it, f.o.b. Chicago, all of the turkey logs which the partnership was purchasing from Norbest, in minimum quantities of 10,000 pounds at a price of $1.05 per pound to be paid at the time of taking delivery, with the entire purchase price payable on or before August 1, 1954. Up to August 10, 1954, the partnership handled its entire relationship with the Illinois corporation on an open account basis and invoiced the Illinois corporation (R. 60). The partnership never received cash from the Illinois corporation nor was cash paid to Norbest for the account of the partnership for such turkey logs prior to or upon delivery except in instances in which the Illinois corporation specifically requested a sight draft shipment to a third-party customer (R. 60-61).

The partnership was in fact substantially in default in its payments to Norbest in late July when Mr. Towle wanted to take his European vacation (Pl. Ex. 12, R. 133). The Illinois corporation was also in default to the partnership.

On or about July 22, 1954, Towle, on behalf of the partnership, wrote a letter to Norbest (Pl. Ex. 8, R. 123-4). This initiated a series of correspondence between the parties culminating in a meeting in Salt Lake City on August 9 and 10, 1954. It is particularly in connection with this correspondence and the Salt Lake City meeting that appellants lose contact with the evidence and uncontested findings of fact.

In this first letter of July 22, Towle *inquired* whether Norbest would be willing to make shipments for the account of the partnership of the balance of the turkey logs directly to the Illinois corporation on the basis of orders issued directly to Norbest by the Illinois corporation, to invoice the Illinois corporation on the basis of $1.05 per pound,

f.o.b. Chicago, with payments to be made directly to Norbest by the Illinois corporation, and Norbest to credit the partnership's account on the basis of 99¢ per pound and with the 95¢ per pound retroactive figure to be credited at the proper time. He asked for "immediate consideration of this suggestion" (Pl. Ex. 8, R. 123-124). This *inquiry* was made by Towle because he was leaving for Europe and it would be more convenient for him to have the matter handled in this way and have the Illinois corporation pay Norbest directly during his absence rather than to have the Illinois corporation pay the partnership on the basis of invoices issued by the partnership and the partnership pay Norbest on the basis of invoices issued by Norbest to the partnership (Pl. Ex. 8, R. 123-4). These facts are all found in Finding of Fact VI (R. 36-7) and have not been specified in appellants' Statement of Points as error.

Appellants assert on page 7 of their opening brief that Towle *instructed* Norbest to do certain things in his letter of July 22, 1954 (Pl. Ex. 8, R. 123-4). In fact, that letter contains no *instructions* to Norbest. It is undisputed that up to the time that letter was sent, Norbest was not and had not been the partnership's agent and owed no duty, contractual or otherwise, to the partnership, except to sell to it the turkey logs in accordance with the terms of the contract between Towle and Norbest. Consequently, neither the partnership nor Towle had any power to issue such instructions to Norbest. Moreover, it is patent from the words of the letter itself that it was a letter of inquiry, not a letter of instructions. Towle said in the concluding paragraph of his letter:

> "Will appreciate your immediate consideration of this suggestion so that I can make my necessary plans." (Pl. Ex. 8, R. 124)

Appellants have a great deal of trouble regaining contact with reality, for on page 8 of their opening brief they state that Norbest, in a letter dated July 30, 1954, (Pl. Ex. 9, R. 125-6) consented to and accepted Towle's proposals including sight draft bill of lading.

This letter of July 30, 1954, was concerned with an entirely different subject and did not even mention the 95¢ price charged by Norbest to the partnership or the $1.05 price which Towle had mentioned and requested in his letter of July 22 that Norbest bill the Illinois Corporation on behalf of the partnership. In fact, the letter repudiates any such agency and states that if all turkey logs are not billed by "the tenth, that they be transferred over and we will bill them to you." (Pl. Ex. 9, R. 125-126). It further refers to a phone call of the same date and discusses prices of pending shipments to customers of the Illinois corporation. (See shipment to Wichita, Kansas, of 600 cartons at $1.18 a pound—Pl. Ex. 16, R. 139-140—made on August 3, 1954; Pl. Ex. 18, R. 144-145).

The trial court expressly found that it was not until August 6, 1954, that Norbest *for the first time* advised appellants that *it would be willing, on behalf of the partnership, to make shipments of the balance of the turkey logs to the Illinois corporation directly, to bill the Illinois corporation at $1.05 per pound, and to credit the partnership's account with the difference* (Finding VII, R. 37-8).

The trial court also found that appellants did not, prior to August 6, 1954, *or at any other time,* give *instructions* to Norbest that shipments of turkey logs to the Illinois corporation should be made only on a sight draft basis payable to Norbest.

It should be stressed at this point and borne in mind throughout that appellant Towle testified without equivocation that there was *no* written agreement between the

partnership and Norbest with regard to sight draft billing (R. 79-80). Yet appellants assert on page 8 and throughout their brief that Towle's letters of July 30 and August 3, 1954, and Beyers' letters of July 30 and August 6, 1954, constitute such an agreement. Apparently consistency has, at long last, ceased to be a virtue.[1]

Although Towle had not heard from Norbest concerning its willingness to act as the partnership's agent, he wrote a letter to the Illinois corporation on August 3, 1954 (Pl. Ex. 10, R. 127-129). In this letter he said he had "asked Norbest to *bill* you direct for me". (Emphasis added.) He then concluded by saying that if "there is any possibility that you will not be able to pick up the *invoices* for the balance of the turkey logs, that you notify Norbest so

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1. On pages 7 and 8 of their opening brief, appellants make some statements which infer an agreement to ship sight draft to the Illinois corporation. They state that Norbest has conceded that it failed to follow instructions and ship on a sight draft basis and that it has admitted in its answer that a particular shipment was to be on sight draft bill of lading basis and was later billed to the Illinois corporation on a different basis. (Complaint, para. 12-13, R. 7; Answer, para. 1, R. 22; para. 4, R. 23.) Since appellants press this argument throughout their opening brief, it will be considered here. As the record indicates, the shipment referred to on pages 7 and 8 of Appellants' Opening Brief (Invoice T-855) was a shipment made on August 3, 1954, to three buyers from the Illinois corporation. The Illinois corporation directed, through Towle, that this shipment be shipped sight draft bill of lading or C.O.D., and shipment *was* made by sight draft. However, one of the consignees refused to accept delivery; and after payment was refused by the consignee, this portion of the shipment was transferred on August 16 to the account of the Illinois corporation and placed in storage with the Kansas Cold Storage Co., Wichita, Kansas (Pl. Ex. 16, R. 139-140; Pl. Ex. 18, R. 144-5). Appellant George himself admitted that the partnership had never, prior to August 10, 1954, sent or used the sight draft or sight draft bill of lading in its dealings with the Illinois corporation, except in those instances in which the Illinois corporation had requested sight draft shipments to *its* customers, including this shipment to Wichita (R. 61). Appellants either cannot or will not recognize that this transaction is totally irrelevant to the issues now before this Court.

that they would be in a position to dispose of any surplus inventory". (Emphasis added.)

Up to this point then, not a word mentioned of any sight draft bill of lading to Norbest, and now a letter to the Illinois corporation saying they are going to be *invoiced!* And if there is any lingering doubt, Mr. Towle's next letter to Norbest dispels it. He also wrote them on August 3 (Pl. Ex. 11, R. 130-132). He said that he had notified the Illinois corporation "that the *invoicing* would come from your office on the basis of $1.05 a pound with payment to be made to Norbest * * *. I also suggested that in the outside possibility that he would not be in a position to pick up the balance * * * to advise you * * * so that you could dispose of them * * *. *I don't think there is a possibility of this occurring.*" Then, after apologizing for running off on vacation and putting the burden of *"invoicing and collecting"* on Norbest, Mr. Towle sugarcoated the pill by giving some friendly advice to the effect that "As for future deliveries, I *think* that the sight draft payable to Norbest is the only solution to insure prompt payment". (Emphasis added.)

This is the only place in the whole series of correspondence where appellants ever used the words "sight draft" to Norbest or the Illinois corporation. It is used here only in the subjective sense of "I think", after he said he had told the Illinois corporation they are going to be *invoiced.* It is not a direction or even a request. It could not be either one since up to this point Norbest had not agreed to do anything for appellants.

It was not until August 6, 1954, that Mr. Beyers of Norbest indicated that he would be willing to do anything in accordance with the suggestions made up to this point by appellants, and he did not agree to any sight draft billing to the Illinois corporation. He said (Pl. Ex. 12, R. 133-4):

> "I have your letter of August 3rd in which you request that we *bill* the organization in Chicago at $1.05 a pound and credit Towle Manufacturing Company with the difference. We will be glad to do this." (Emphasis added.)

Thus, the "undisputed documentary evidence" referred to on page 9 of Appellants' Opening Brief, and again on page 30 as being the evidence on which the agency relationship principally rested, not only fails to establish an agency relationship in which Norbest agreed to ship on a sight draft bill of lading basis, but fully supports the findings that no such instructions were given on or prior to August 6, 1954. This documentary evidence also established that as of August 6, 1954, appellants had requested Norbest and Norbest had agreed only to *invoice or bill* the Illinois corporation for the partnership.

Beyers of Norbest also said in his letter of August 6, 1954, to Towle:

> "It appears we extended the time until August 10th for the billing to be complete and I am hopeful it can be worked out on this basis. In the event that we are unable to get the 190,000 pounds of logs billed and paid for within the allotted time, we see no alternative for us but to request the cancellation of the agreement which we made and which you are a party to."

This statement of a possible cancellation of the agreement led to a meeting which was arranged among Towle and George, Norbest, and a representative of the Illinois corporation (Pl. Ex. 10, R. 127-9). This meeting was held in Salt Lake City, Utah, on August 9 and 10, 1954, (R. 52-55, 89-92) and it was at this meeting that the agreements among the parties were confirmed. At that meeting it was orally agreed among appellants, Norbest, and the Illinois corporation that a transfer of the remaining turkey logs would be made by Norbest directly to the Illinois corpora-

tion on the basis of orders issued by the Illinois corporation; that Norbest would *invoice* the Illinois corporation directly for these orders at $1.05 per pound (R. 78); that the Illinois corporation would pay in full for all of said turkey logs by August 25, 1954; and that after all of the approximately 190,000 pounds had been sold and Norbest had been paid for them in full, any credit which was then accrued to the partnership would be paid by Norbest to the partnership (Pl. Ex. 13, R. 135-6; Pl. Ex. 14, R. 136-7; Def. Ex. A, R. 145-6; R. 90-92; R. 70-80). All these facts are found in Finding VIII (R. 38-9) and again appellants do not specify in their statement of points any error in these findings. Nor do they argue that these facts are not supported by substantial evidence.

The facts are in direct dispute as to whether at these meetings Norbest said anything to the Illinois corporation about sight draft billing. However it is undisputed that at no time during the meetings did George or anyone else instruct Norbest to ship to the Illinois corporation on a sight draft bill of lading basis only (R. 91). Appellants do not even argue that any such instructions were given at this time to Norbest or that it was brought to their attention (Testimony of George, R. 66). It is inconceivable that, if any agency requiring sight draft billing was intended, it would not have been specifically brought to Norbest's attention at this time in view of all of the previous correspondence which had referred to invoicing only. The fact is that this was not intended and invoicing on open account was agreed upon. The nearly contemporaneous letter written by Mr. Towle to his office on August 12 establishes this. In this he said (Def. Ex. A, R. 145-6):

> "T.F.P. Inc. have also agreed to be *invoiced* and pay for some 80,000 lbs. *and* pay up by August 20. We should receive our check from Norbest shortly after * * *." (Emphasis added.)

No mention in this letter of any sight draft. It refers to invoicing *and* paying up by a later date. To remove any doubt, Mr. Towle testified that as to any agreement for sight draft billing by Norbest,

> "I don't recall there was anything oral, and I am—I know there is no written agreement. I am sure." (R. 79)

Thereafter Norbest, as agent for the partnership, and in accordance with its agreement with and instructions from the partnership and appellants, made shipments directly to the Illinois corporation on or before August 25, 1954, (Pl. Ex. 16-A, R. 140-1) of the entire balance of the approximately 190,000 pounds of turkey logs and transmitted invoices or sight drafts directly to the Illinois corporation in connection with these shipments at $1.05 per pound. All of these shipments or transfers were made in approximately the same manner as and followed approximately the same practice as appellants had followed in making previous shipments or transfers from appellants to the Illinois corporation.

Under the terms of appellants' contract with Norbest, they were required to make payment in full by August 1, 1954; this had been extended by Norbest to August 10, 1954; payment had not been made at the time of the meeting of August 9-10; therefore the *entire* amount of approximately $187,000 for the approximately 190,000 pounds of turkey logs purchased by appellants from Norbest was at that time due, owing, and payable (Pl. Ex. 16-A, R. 140-142; R. 59; Pl. Ex. 4, R. 117, 14-16). However, at this meeting Norbest agreed to extend this payment date to August 25th (Pl. Ex. 13, R. 135-6), and it was also agreed that the partnership would receive no credit until Norbest had been paid in full (Pl. Ex. 14, R. 136-7).

As Norbest received money from the Illinois corporation on account of such transfers, it credited the amounts against the total amount owing to Norbest by appellants and the partnership for the turkey logs (Pl. Ex. 16-A, R. 140-2). The Illinois corporation refused, however, to pay Norbest the amount for which the Illinois corporation had been invoiced at $1.05, because of "legal problems involved" between appellants and the Illinois corporation and paid instead to Norbest an amount sufficient only to equal the net amount due Norbest from appellants at the rate of 95¢ per pound (Pl. Ex. 16-A, R. 140-2; Pl. Ex. 15, R. 137-8). There was nothing left in Norbest's hands to pay over to appellants. For these reasons the complicated mathematics at pp. 11-13 of appellants' brief are meaningless.

When Towle returned from Europe, he and Herbert Beyers had another meeting in Salt Lake City on October 26 or 27, 1954 (R. 81; R. 92). At that meeting Towle and Beyers discussed the fact that the full sale price had not been paid by the Illinois corporation. Towle however said absolutely nothing to Beyers relative to Norbest's alleged failure to bill by sight draft bill of lading or the alleged unauthorized extension of credit by Norbest (R. 92-4; R. 81-3).

In November, 1954, Towle met with an officer of the Illinois corporation in Chicago, but Towle did not recall discussing with him the matter of sight draft bills of lading or anything of that sort (R. 83-4).

As Towle stated, the matter of some responsibility on the part of Norbest was, as far as he individually was concerned, an afterthought after he had found that he could not collect the sum of money allegedly owing from the Illinois corporation (R. 84-8). In fact, the first time that Norbest became aware that Towle or the partnership was making a claim against it was nearly a year later, in September 1955 (R. 94).

The instant litigation is the brainchild of Towle's abortive afterthought. This brainchild miscarried in the trial court. The issues raised in Appellants' Opening Brief are, as they were in the trial court, almost exclusively factual.

While it is only natural that appellants are disappointed by their failure to recover, it is somewhat unnatural that they should argue in a vacuum. If they are to be fair-minded at all, they cannot argue that the findings are not supported by substantial evidence and they make no serious attempt to do so. Instead, they wishfully attempt to argue about types of agencies which do not exist here. In the present state of this record the findings of the trial court are not open to question and the trial court's determination of the factual issue adverse to appellants, as outlined above, should be accepted as binding and conclusive on this appeal.

APPELLEE'S ARGUMENT

I.

The Findings of Fact as Found by the Trial Court Are Sustained by Substantial Evidence and Dispose of this Action.

A. WHAT WAS THE SCOPE OF THE AGENCY CREATED BETWEEN NORBEST AND APPELLANTS?

Appellee has no quarrel with the application of California law to the instant case.

Likewise appellee has no quarrel with the general proposition that Norbest did in fact act as the agent of appellants. This statement by itself, however, means very little, for the crucial questions which still must be answered are:

1. What was the scope of the agency created?
   a. What was Norbest instructed to do?
   b. What did Norbest agree to do?
2. What did Norbest actually do?

It is in regard to these four crucial questions that appellants' argument and their opening brief run awry. Out of sheer necessity appellants have created or assumed a phantom agency relationship which never in fact existed. The simple and complete answer to appellants' argument is that the agency or agencies which they have created in their opening brief exist only in their opening brief. They have no existence in fact.

Much has been said in Appellants' Opening Brief concerning the duties owed by an agent to his principal. Nothing has been said by appellants respecting the duty owed by the principal to his agent. This omission is understandable, however, for even a partial exposition of the duties of the principal to his agent is a near fatal blow to appellants' case and the phantom agency created by them.

The duty of the principal is partially stated in Mechem, *Agency* (2d ed., 1914) in Section 792 as follows:

> "It is the duty of the principal, if he desires an authority to be executed in a particular manner, to make his terms so clear and unambiguous that they cannot reasonably be misconstrued. *If he does this*, it is the agent's duty to the principal to execute the authority strictly and faithfully; * * *." (Emphasis added.)

In the next section of the same work the author states the effect of a failure on the part of the principal to make his instructions so clear and unambiguous that they cannot be reasonably misconstrued. In Section 793 Mechem states:

> "§ 793. *When ambiguous, construction adopted in good faith, sufficient.*—But if, on the other hand, the authority be couched in such uncertain terms as to be reasonably susceptible of two different meanings, and the agent in good faith and without negligence adopts one of them, the principal cannot be heard to assert, either as against the agent or against third persons who have, in like good faith and without negligence, relied upon the same construction, that he intended the authority to be executed in accordance with the other interpretation. If in such a case, the agent exercises his best judgment and an honest discretion, he fulfills his duty, and though a loss ensues, it cannot be cast upon the agent.
>
> "An instrument conferring authority is generally, it is said, to be construed by those having occasion to act in reference to it, 'as a plain man, acquainted with the object in view, and attending reasonably to the language used, has in fact construed it. He is not bound to take the opinion of a lawyer concerning the meaning of a word not technical and apparently employed in a popular sense.'"

This rule was adopted by the *Restatement of the Law of Agency,* and appears in the *Restatement of Agency* 2d as Sections 26 and 33, which provide as follows:

"§ 26. Creation of Authority; General Rule

"Except for the execution of instruments under seal or for the performance of transactions required by statute to be authorized in a particular way, authority to do an act can be created by written or spoken words or other conduct of the principal which, *reasonably interpreted,* causes the agent to believe that the principal desires him so to act on the principal's account."

* * * * * * *

"§ 33. General Principle of Interpretation

"An agent is authorized to do, and to do only, what it is reasonable for him to infer that the principal desires him to do in the light of the principal's manifestations and the facts as he knows or should know them at the time he acts." (Emphasis added.)

Finally the same rule has been codified in the California Civil Code as Sections 2315 and 2316, which provide as follows:

"§ 2315. Measure of agent's authority. An agent has such authority as the principal, actually or ostensibly, confers upon him."

"§2316. Actual authority, what. Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess."

The sum total of this authority is this: A principal must make his instructions to his agent clear and unambiguous. If he fails to do so, and the agent acts reasonably in light of what he honestly thought the principal meant, he has actual authority to act in that way and will not be liable to the principal for a breach of duty. But most importantly—it is a pure question of fact as to what those instructions were.

Bearing these principles in mind, what was the scope of the agency created between Norbest and appellants?

1. The Agency Did Not Include Any Requirement of Sight Draft Billing.

Considering first the allegations of appellants' complaint, the question presented is whether Norbest was appellants' agent to ship to the Illinois corporation on a sight draft bill of lading basis only. It is almost undisputed that no such instructions were in fact given to Norbest. Appellants have practically abandoned this argument in their opening brief, the trial court has expressly found that no such instruction was given, and the evidence abundantly supports this finding.

The correspondence up to the August 10 meeting in Salt Lake City is replete with references to billing or invoicing on open account. Towle testified that there was no written agreement and that he did not recall any oral agreement for sight draft billing (R. 79). George testified that at the meeting on August 10, 1954, in Salt Lake City he did not say anything to Herbert Beyers about shipping on a sight draft bill of lading basis (R. 66). Beyers testified that no such instructions were given to him at that meeting by anyone (R. 91).

Beyers' letter to Adams of the Illinois corporation dated August 10, 1954, the same date as the one on which the meeting was held at which the agency relationship was created, states that it was agreed that the turkey logs on hand in the warehouses would be re-labeled and paid for by the Illinois corporation by August 20, 1954, except tonnage in Los Angeles to be paid for by August 25, 1954 (Pl. Ex. 13, R. 135-6).

Towle's understanding, as evidenced by a letter written to his accountant from New York City on August 12, 1954, was substantially in accord, and specifically to the effect that the Illinois corporation was to be invoiced (Def. Ex. A, R. 145-6).

Towle made no mention of any failure to bill sight draft when he was discussing the refusal of the Illinois corporation to pay the full amount of the invoice with Norbest and the Illinois corporation on his return from Europe (R. 82, 83).

The only shred of evidence opposed to this mass of evidence is Towle's lonely "I think * * *" statement contained in his letter of August *3,* 1954 (Pl. Ex. 11, R. 130-2). Towle said only:

> "As for future deliveries, *I think* that the sight draft payable to Norbest is the only solution to insure prompt payment." (Emphasis added.)

This statement was both equivocal and ambiguous. All Towle's statement could possibly indicate is that at most there was a preliminary mention of such an arrangement and not a clear cut understanding or direction that this was the way the shipments were to be handled. Towle did not say "It must be done this way." He said only "I think * * *", and Norbest did not agree to do it this way.

This is precisely the kind of ambiguous and equivocal statement which Mechem and the other authorities must have had in mind when they formulated the rules expressed earlier.

Viewing this evidence in its entirety, the trial court found that the agency did not include any instructions to Norbest to ship on a sight draft bill of lading basis only. The foregoing evidence clearly sustains this finding. So far as this Court is concerned the conflict, if any exists, was for the trial court to determine.

What then was Norbest authorized and instructed to do?

2. The Agency Provided for Invoicing on Open Account.

This is summarized in Findings VI, VII, and VIII (R. 36-39). These findings, insofar as they relate to an express

agreement, are based upon all the evidence referred to supra at pp. 5 to 16 of this brief, including the correspondence authored entirely by appellants which refers to "invoicing" of the Illinois corporation, the past practices of the parties, Towle's contemporaneous letter reciting the agreement for invoicing reached at the August 10 meeting, and the oral testimony.

These findings state that it was agreed that a transfer of the turkey logs then remaining in the warehouse would immediately be made by Norbest to the Illinois corporation and would be re-labeled in the name of the Illinois corporation (Pl. Ex. 13, R. 135-6). It was further agreed that transfer or shipment of these turkey logs would be made by Norbest directly to the Illinois corporation on the basis of orders issued by the Illinois corporation, and that Norbest would *invoice* the Illinois corporation for them at $1.05 per pound (Def. Ex. A, R. 145-6; Pl. Ex. 8, R. 123-4; Pl. Ex. 10, R. 127-9; Pl. Ex. 11, R. 130-2; Pl. Ex. 12, R. 133-4). It was also agreed that the Illinois corporation would pay in full for these turkey logs by August 25, 1954 (Pl. Ex. 13, R. 135-6). Finally it was agreed that after all of the approximately 190,000 pounds of turkey logs had been sold *and* Norbest had been paid in full, any credit which was then accrued to the partnership would be paid by Norbest to the partnership (Pl. Ex. 14, R. 136-7). This is all that was agreed among the parties. This is all that appellants instructed and authorized Norbest to do. This was therefore the scope of the agency.

Not only have appellants failed to designate the portions of the foregoing findings referred to as erroneous, they have not even argued or shown that they are not supported by substantial evidence. Even when appellants discuss these findings, they state only that they are in error in so

far as they hold that extension of credit was not a violation of specific instructions or the agency agreement. The finding of express authority to ship to the Illinois corporation and invoice on open account is amply supported by the record and therefore is binding on this Court. The statements at pp. 42, 45, and 57 of the opening brief that there is no finding and that the record nowhere shows that Norbest was expressly authorized to extend credit, i.e. ship and invoice on open account, are simply not true.

In addition, this authority to ship and invoice on open account is readily implied from evidence apart from the letters and statements of the parties.

On page 35 of their opening brief, appellants cite Section 65 of the *Restatement of the Law of Agency* for the proposition that *unless otherwise agreed* (it was so otherwise agreed), authority to sell includes only authority to sell for money or the customary medium of payment, payable at the time of the transfer of title. Appellants have, however, failed to include a very important comment on the section of the Restatement cited by them. In *Restatement of the Law of Agency* 2d, in comment "b." on section (1) of Section 65, the authors state:

> "b. Although the specific terms of the authorization do not direct the receipt of anything other than money by the agent, the previous course of conduct by the principal or the customs of the particular locality with reference to the sale of the subject matter in question may indicate that the agent can properly receive something else for it. Authority to contract for payment by certified check or bank draft payable to the principal is frequently inferred. *Likewise, a sale on credit is frequently inferred from a previous course of dealing by the principal or others engaged in like business.* * * *" Restatement, *Agency* 2d at p. 178. (Emphasis added.)

In the instant case appellants had always shipped to and invoiced the Illinois corporation just as Norbest in fact did (R. 60). Norbest knew that this was the practice of the appellants. When Towle wrote his original letter on July 22, 1954 (Pl. Ex. 8, R. 123-124), he specifically inquired whether Norbest would be willing to *invoice* the Illinois corporation. The clear meaning of that letter and the subsequent correspondence was simply that appellants would be eliminated as a middle man and that the shipping and invoicing would go on exactly as before with that one exception. The trial court found (Finding IX, R. 39) that all of the shipments to the Illinois corporation were made in approximately the same manner and followed approximately the same practice as appellants had previously followed with regard to the Illinois corporation.

This is the type of previous conduct which the authors of the Restatement had in mind. Norbest did the same thing as appellants themselves had done in the past, acting pursuant to instructions from appellants to ship and to invoice. It is clear that even if Norbest was, as appellants contend and we emphatically deny, an agent to sell goods to the Illinois corporation it had implied authority to ship and to invoice as it in fact did.

The findings and conclusions of the trial court are also supported by the undisputed subsequent conduct of the parties to the agency agreement.

If we assume, as appellants contend, that the agency was not clearly spelled out so as to permit invoicing on open account, then the general rule of law, that if the agent's authorization is ambiguous the interpretation acted upon by the parties controls, would prevail. This rule is set forth in Restatement *Agency* 2d at Section 42 in the following language:

> "If the authorization is ambiguous, the interpretation acted upon by the parties controls." Restatement, *Agency* 2d at p. 133.

The Comment on this section states:

> "a. The subsequent conduct of the parties to an agreement with reference to it is determinative, unless it is so clearly expressed in view of the attendant circumstances that it cannot reasonably be given the interpretation which the parties indicate by their conduct. If their subsequent conduct is contrary to the terms of the clearly expressed document, it may be found either that the document did not express the agreement, in which case the document can be reformed, or that the subsequent conduct indicates a new agreement as to the authority."

In the instant case Towle's "I think * * *" statement is at best equivocal and ambiguous. However, the undisputed conduct of both Norbest and appellants subsequent to August 10, 1954, was perfectly consistent (until September 1955) with the facts as found by the trial court. Norbest with the full knowledge of appellants shipped to and invoiced the Illinois corporation on an open account, collected funds from the Illinois corporation, and applied those funds to the partnership's account with Norbest. Towle did not complain to Norbest when he returned from his European vacation in October 1954, about Norbest's failure to ship on a sight draft bill of lading basis or about Norbest's "extension of credit" to the Illinois corporation. Likewise Towle did not complain to the officer of the Illinois corporation on either count when Towle conferred with him in November 1954. It was only after Towle discovered that he could not collect the amount owing to the partnership from the Illinois corporation because of "legal problems in-

volved" that he sought to hold Norbest liable. Towle admitted that as far as he individually was concerned, the question of Norbest's liability was an *afterthought* (R. 84-8). In fact it was not until more than a year after the last shipment was made that Norbest first learned that appellants considered Norbest liable for the loss appellants had sustained.

It would be difficult to imagine a case which would fit more squarely within the rule announced in Section 42 of the *Restatement of Agency* 2d and Comment "a." thereto. The subsequent conduct of the parties to the agency agreement is undisputed and was consistent until September 1955. This conduct clearly supports the findings and conclusions of the trial court that Norbest was instructed to ship to and to invoice the Illinois corporation on an open account and that Norbest did not violate any of the terms of its agency.

B. APPELLANTS HAVE THE BURDEN OF ESTABLISHING THE SCOPE OF THE AGENCY, AND THE COURT DID NOT ERR IN THIS REGARD.

Appellants completely avoid the basic issue in this case, which is—what was the scope of the agency? Instead of attacking the findings which establish this basic factual issue, they attempt to circumvent them by charging that they are based on an erroneous application of law. Appellants argue first that Norbest had the burden of proving it could extend credit to the Illinois corporation, secondly that the trial court mistakenly placed the burden on appellants to prove that credit could not be extended, and thirdly that Norbest has not sustained the burden which it should have had placed upon it.

1. The Burden of Proof.

Appellants first base this argument that Norbest had the burden of proving it could extend credit to the Illinois

corporation on the assumption that Norbest acted as appellants' agent *to sell* turkey logs to the Illinois corporation. Indeed on page 61 of their opening brief they state that Norbest assumed appellants' place as seller under the sales contract. All of the cases cited by appellants from page 34 to page 38 of their opening brief deal with fact situations in which the agent agreed to *sell* goods for the principal and allegedly breached its duty by extending credit. See *Leland v. Oliver,* 82 Cal. App. 474, 255 Pac. 775 (1927); *Lahr v. Kramer,* 91 Minn. 26, 97 N.W. 418 (1903); *San Pedro Lumber Co. v. Reynolds,* 121 Cal. 74, 53 Pac. 410 (1898); *Schwarting v. Artel,* 40 Cal. App. 2d 433, 105 P.2d 380 (1940). All of these cases are distinguishable from the instant situation on their facts, and the assumption is groundless, for in the present case Norbest was not instructed nor did it agree *to sell* the turkey logs to the Illinois corporation. Its agency was much more limited and it agreed only to ship, to invoice, and to credit the partnership's account with Norbest when it received funds from the Illinois corporation. In effect the only thing done was to substitute, for the past practice of an invoice from Norbest to the partnership and an invoice from the partnership to the Illinois corporation, an invoice from Norbest to the Illinois corporation. The sale of these turkey logs to the Illinois corporation by the partnership had already taken place on June 10, 1954 (Pl. Ex. 6, R. 121, 16-22).

Each of the cases is distinguishable in yet another way. In *Leland v. Oliver, supra,* for example, the matter was heard entirely on plaintiff's testimony; defendant refused to introduce any testimony at all. Plaintiff had *proved* that *under its agreement* with the defendant, *defendant was to sell* and dispose of the crops and turn over one third of the value thereof to plaintiff *in cash.* Plaintiff *further*

proved that he had *not been paid.* Defendant argued that plaintiff also had to prove that defendant had in fact received payment. The court said:

> "* * * we think the trial court did not err in denying the defendant's motion for a nonsuit and that the burden was cast upon the defendant to show what he had done with the property and why he has not paid over to the plaintiff her share of the proceeds of the sale thereof, and upon his declining to do so, the trial court was authorized to enter judgment for the plaintiff." 82 Cal. App. at p. 479.

In the instant case appellants have *not proved* that Norbest was to *sell and dispose of the turkey logs for cash.* Whether the transfer was to be for cash is the really basic factual issue. The facts show only that Norbest was to ship, invoice, and credit appellants only when the Illinois corporation paid. And in the instant case Norbest showed why it hadn't turned over any proceeds to the partnership —it is undisputed that nothing remained after satisfying the partnership's obligation to Norbest.

Appellants themselves admit that *San Pedro Lumber Co. v. Reynolds, supra,* is inapplicable on its facts since there is no fraud or bad faith, but cite *Reynolds v. Hook,* 109 Cal. App. 226, 292 Pac. 1000 (1930), as applying the *San Pedro* rule to the present case. The fact is that *Reynolds v. Hook, supra,* does not even discuss or indeed *mention* "burden of proof." It is therefore not authority for appellants' position.

A correct statement of the law on the burden of proof in a case like the present one is found in Mechem, *Agency* (2d ed., 1914) at Section 298:

> "As has already been stated, the burden of proving agency, including *not only the fact of its existence, but its nature and extent,* rests ordinarily upon the party who alleges it." (Emphasis added.)

This rule of law is most often cited in actions in which the principal is asserting a limitation on the agent's authority to escape liability to a third party. This is understandable because it is not often that a principal suing an agent will argue to an appellate court that he doesn't have to prove the terms of the agency. That this is also the rule of law as between principal and agent is established by *Lowry v. Atlantic Coast Line R. Co.,* 92 S.C. 42, 75 S.E. 278 (1912). In that case plaintiff-principal sued defendant-agent for loss and damage to a shipment of household furniture which plaintiff had shipped. In affirming a judgment for plaintiff for such loss and damage, the court said:

> "It is 'hornbook law' that the agent must act within the scope of his authority or within the apparent scope of his authority. Whenever there is evidence that there is an agent acting in the apparent scope of his authority to do certain things, and it is shown that he has done these things apparently acting in the scope of his authority, then the burden would be shifted to the other side, and it would be necessary for them to show by the greater weight of evidence that these acts on the part of the agent were outside of this authority. *A principal who asserts that his agent has acted outside of his instructions must show it by the preponderance of the evidence.* Whaley v. Duncan, 47 S.C. 139, 25 S.E. 54." 75 S.E. at p. 281. (Emphasis added.)

The risk of nonpersuasion in the instant case was on appellants. They were required to show by a preponderance of the evidence that Norbest violated a limitation on its authority, i.e., to establish in the first place what instructions were given to the agent. Appellants state on page 34 that *"once the agency relationship has been established,* the California courts allocate to the agent the burden, etc." This is the whole point—the agency relationship which was

established here precludes the contentions appellants are making.

On pages 38 and 39 of their opening brief appellants cite cases involving agents for collection and conclude from these cases that Norbest must account to the principal for the total amount collected or discharge the liability by proving it was authorized to extend credit. The cases cited are *Luckehe v. First National Bank of Marysville,* 193 Cal. 184, 223 Pac. 547 (1924) and *Stetson v. Briggs,* 114 Cal. 511, 46 Pac. 603 (1896). Again, as before, these cases are totally inapplicable because Norbest was not an agent for collection, as that term is traditionally used.

In addition, these cases only say that an agent for collection must not accept anything other than money in payment of the debt to be collected. Nothing but money was accepted by Norbest. They do not say, as appellants would have this Court believe, that if the agent fails to collect the entire amount of the debt because the debtor refuses to pay, the agent is then liable to the principal for the unpaid balance. We are not concerned with the law of guaranty or insurance. If the Illinois corporation in fact owed appellants the amount which appellants claim they should have received, that amount is still owing, unless barred by the statute of limitations. Norbest has done nothing to prejudice appellants' rights to collect the balance due from the Illinois corporation if in fact they have a legal right to do so.

Comment (a) on Clause (a) of Section 72 of *Restatement of the Law of Agency* 2d, at page 186, states:

> *"Comment on Clause (a):*
>
> a. *Payment in full.* Authority to collect does not include authority to compromise, to release any part of the debt, or to permit a deduction because of an alleged set-off or counterclaim. Nor is a collecting agent authorized to accept a part payment, even with-

> out extension of time or other consideration, *if the part payment, as the agent has notice, would prejudice the collection of the residue, as where it affects the choice of an appropriate remedy or the court in which suit must be brought. The receipt of part payment, however, is authorized if such receipt does not prejudice the position of the principal, and in many situations it is also authorized because of the circumstances under which the agent is employed, as where an overdue claim against an impecunious debtor is given to a collection agency.*" (Emphasis added.)

To the same effect see Mechem, *Agency* (2d ed., 1914) Section 955.

Thus even if Norbest was an agent for collection it did not breach a duty when it accepted part payment from the Illinois corporation, for there is no showing that appellants' rights to collect the balance from the Illinois corporation were prejudiced.

2. The Trial Court Did Not Err.

Having made the first unwarranted and illogical assumption that the burden of proof was on Norbest to prove the scope of the agency, appellants are forced to say something to attempt to sustain the next step in their argument that the court improperly imposed that burden on the appellants. It is difficult even to answer this argument because the basic assumption is so incorrect.

Appellants assert that because of the sentence in the Memorandum for Judgment (R. 33) to the effect that:

> "The evidence that credit could not be extended by the agent was ambiguous, and therefore not persuasive. * * *"

it must be necessarily implied that the court placed upon the appellants the burden of showing that Norbest could not extend credit (Appellants' Brief, p. 42).

Irrespective of where the proof came from, it is the law, as quoted by appellants in their own brief (*Aetna Insurance Company v. Taylor,* 86 F.2d 225, 227 (5th Cir. 1936), Appellants' Brief, p. 40), that the burden of proof is satisfied by actual proof of the facts of which proof is necessary regardless of which party introduces the evidence. It is certainly abundantly clear from the facts that the agency agreement did not include any requirement or agreement that credit was not to be extended (See pp. 20 to 21, supra) and that it did include the right to invoice on open account (See pp. 21 to 26, supra). Therefore, even if we are to assume for the purposes of argument that appellants' position is correct, the question of burden of proof is no longer relevant since it has been satisfied by proof of the facts.

Apart from this, however, the position of appellants in this respect is simply not true. The whole of the trial court's statement in its Memorandum for Judgment is as follows:

> "From the evidence the Court concludes that the defendant did not violate its understanding with plaintiff. The evidence that credit could not be extended by the agent was ambiguous and therefore not persuasive. From all of the evidence, the Court concludes that defendant had authority, either express or implied, to act as it did." (R. 33)

The trial court was thus saying:

1. The facts establish that Norbest had the understanding with appellants and authority from appellants to ship directly to the Illinois corporation, to invoice the Illinois corporation for these shipments and to receive funds from the Illinois corporation. This is what Norbest did do.

2. The contention advanced as a part of the pleading by appellant and as a part of its proof that there was a restriction on Norbest's authority in that all shipments had to be made by sight draft bill of lading and could not be made by invoice was ambiguous and could not be believed.

A fair reading of the Memorandum for Judgment can lead only to this conclusion, and it is impossible to infer from this memorandum that the court allocated a burden of proof one way or the other. The court clearly based its decision upon all of the evidence.

As a part of this same argument, appellants state at page 42 that there is no express finding that Norbest could extend credit. This statement is rather shocking in view of the express finding (Finding VIII, R. 38) that "it was orally agreed * * * that defendant would invoice the Illinois corporation" and the conclusion (Conclusion of Law III, R. 41) that "Defendant agreed to act as the gratuitous agent * * * for the purposes of shipment of turkey logs to, invoicing of and receipt of funds from Turkey Log Corporation of Illinois."

3. The Evidence Supports the Findings.

Finally, appellants at pages 44 through 51 and 57 through 67 of their opening brief rehash selected portions of the facts and the evidence, concluding that Norbest has not met its burden of proof and therefore the judgment of the District Court should be reversed.

During the course of this argument, appellants set forth eleven items of "undisputed evidence" which allegedly support their conclusion. Not only are many of these items disputed, they simply do not support appellants' assertions.

The first four items, listed on pages 45 and 46 of Appellants' Opening Brief concern the contracts between Norbest and Towle and Towle and the Illinois corporation, and a collateral contract between Norbest and the Illinois corporation. What any of these contracts may have said is irrelevant to the basic issue in this case—which is, what were the terms of the agency? It should be noted, however, that the Norbest contract with appellants and appellants' contract with the Illinois corporation did *not* provide for *cash on delivery*. They simply provided for partial payment in the event of partial withdrawals as distinguished from the general requirement for total payment by August 1. The collateral contract between Norbest and the Illinois corporation provided for "invoice *or* sight draft."

In item 4, appellants speak of Norbest "relaxing" its cash on delivery "requirements" to appellants and appellants in turn "relaxing" their cash on delivery "requirements" to the Illinois corporation. This statement is patently false and misleading. Such requirements were never "relaxed" because they never in fact existed. Nor were any such requirements observed by any of the parties from the very inception of the contracts. The facts are undisputed that Norbest had never insisted upon a cash payment by the partnership before turkey logs were delivered to it. Norbest *invoiced* the partnership, and the partnership paid these invoices after receiving them. Similarly, the partnership had never insisted on cash on delivery from the Illinois corporation and had always invoiced it.

This point is also raised at pages 59-61 of the opening brief in support of an argument that an agent does not have authority to waive a contractual provision favorable to his principal. As just mentioned, the contracts did not require that the price be paid in cash *before* delivery of

the turkey logs. This is not the meaning of the contractual provisions, and the subsequent action of the parties in regard to these provisions sustains this.

It is a general rule of law that when the action of all parties to an agreement indicates that they place a particular interpretation upon that agreement, that meaning should be adopted by the courts if a reasonable person could attach such a meaning to the contract.

See, *Restatement of the Law of Contracts,* Section 235 (e), which provides as follows:

> "(e) If the conduct of the parties subsequent to a manifestation of intention indicates that all the parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation."

See also, *Universal Sales Corporation v. California Press Manufacturing Company,* 20 Cal. 2d 751, at 761-2, 128 P.2d 665 (1942), which stamps the approval of the California Supreme Court on this principle of interpretation.

In *Lease v. Corvallis Sand & Gravel Co.,* 185 F.2d 570 (9th Cir. 1950), Judge Pope said:

> "We think that this September 3 agreement which the parties proceeded to follow and carry into effect was an interpretation given by the parties themselves to their contract which a court should adopt. Williston on Contracts, 3d Ed. § 623; Restatement of Law of Contracts, § 235e.
>
> "As stated by the Supreme Court of Oregon, Kontz v. B. P. John Furniture Corp., 167 Or. 187, 115 P.2d. 319, 325, 'The practical interpretation of the terms of a contract made by the parties while performing it is universally deemed a safe guide to the intended meaning of the instrument.' " 185 F.2d at p. 576.

While the case is not otherwise applicable on the facts, it is evident that this Court recognizes this rule of interpretation.

It is clear from the undisputed conduct of the parties before the instant litigation arose that a cash on delivery requirement was not within their contemplation.

Aside from any question of waiver, the crucial question again is, "What was Norbest authorized and instructed to do?" If it was authorized and instructed to ship and invoice, as the trial court found that it was, no waiver by an agent is in any way involved in this case. If any waiver of contractual rights was made, it was made by appellants themselves when they instructed Norbest to ship and invoice.

The remaining seven items of "undisputed fact" at pages 45 to 48 simply rehash isolated facts which were fully considered by the trial court (considered supra in detail at pages 5 to 16), who found "from all the evidence" that Norbest had authority, *express or implied,* to act as it did.

On pages 64 and 65 of their opening brief appellants mention in passing portions of certain findings of fact which they claim have no support in the record. These claims are clearly without foundation.

Findings V, VII, and IX: Appellants' argument is once again based on their inability to recognize that Invoice T-855 was a special situation and has nothing to do with the present controversy. This invoice dated August 5 was from Norbest to appellants in accordance with the regular practice followed up to that time. The agency agreement related to the balance of turkey logs on hand on August 6 or August 10. Shipment on Invoice T-855 had been made on August 3. T-855 *was* shipped sight draft at the special request of the partnership to a customer of the Illinois corporation. Only the portion which the consignee refused

to accept was put on invoice to the Illinois corporation at a price of $1.05, and this was on August 16 after Norbest had been authorized to invoice the Illinois corporation directly.

Finding VI: Towle's letter of July 22, 1954, contained no instructions. It was a letter of *inquiry*. Appellants themselves recognize this when they refer to the letter on page 8 of their opening brief and speak of Towle's "proposals."

Finding X: Appellants again rehash the argument they made in regard to Findings V, VII, and IX and speak of an imaginary August 20, 1954, deadline. It was agreed at the Salt Lake City meeting that the Illinois corporation would pay in full for the turkey logs by August 25, 1954, not August 20, 1954. No shipments were made after August 25, 1954. In addition it cannot be argued that because the Illinois corporation failed to pay on time that Norbest violated its duty to ship and invoice. Norbest agreed and was instructed to ship, invoice, and receive funds. The Illinois corporation agreed to pay by a certain time. The failure of the Illinois corporation to carry out its agreement does not prove that Norbest violated its duty.

C. IN ANY EVENT, IT IS NOT THE FUNCTION OF AN APPELLATE COURT TO REDETERMINE OR TO REWEIGH THE EVIDENCE.

The foregoing proposition is so universally recognized that a statement of authority is hardly required. In *Liquid Veneer Corporation v. Smuckler,* 90 F.2d 196, 205 (9th Cir. 1937) this Court stated that a verdict should not be set aside if it can be sustained from any viewpoint or approach. This is so even though the appellate court might have reached a different conclusion on the evidence. *National Surety Co. v. Globe Grain & Milling Co.,* 256 Fed. 601, 602 (9th Cir. 1919); *O'Connor v. Ludlam,* 92 F.2d 50,

56 (2d Cir. 1937), *cert. den.* 302 U.S. 758, 58 S. Ct. 364, 82 L. Ed. 586 (1937).

This Court has also held that where an action is tried to the court, the *weight of the evidence* and the credibility of witnesses will not be reviewed. *Ware v. Wunder Brewing Co. of San Francisco,* 160 Fed. 79 (9th Cir. 1908).

It has already been shown that the Findings of Fact of the trial court are supported by substantial evidence. The issues are entirely factual. Not even appellants assert that the Conclusions of Law do not follow from the Findings of Fact. The Findings of Fact are therefore conclusive on this Court, and the judgment of the trial court must therefore be sustained.

II.

The Proffered Testimony of Towle and George Was Properly Excluded as Hearsay.

In the portion of their brief dealing with certain evidentiary rulings of the trial court, appellants advance an argument that would abolish the hearsay rule.

At the trial appellants sought to introduce the substance of certain conversations to the effect that Towle told George on August 9 to "inform" Adams that the balance of the inventory of turkey logs would be handled on a sight draft bill of lading basis and that Towle told Adams of the Illinois corporation on August 10 that future shipments must be paid for on sight draft. *No representative of Norbest was present at nor was* it shown that *Norbest* was *ever aware* of or *advised* of these conversations. The trial court properly ruled such evidence was clearly inadmissible as hearsay.

Appellants now argue that because Towle knew what he said to Adams and George and because George knew what he heard Towle say, the extrajudicial statements are not

hearsay (Appellants' Brief, pp. 52-3). To state such a proposition is to demonstrate its complete absurdity. Under such a rule of evidence, testimony could always be admitted as to extrajudicial assertions made to or by the witness, for the witness obviously knows what was said to him and what he said. A citation of authority on this point is hardly necessary. But see, for example, Witkin, *California Evidence* (1958 ed.) Section 209, at p. 235:

> "A prior out-of-court statement, offered to prove the truth of the matter stated, is inadmissible hearsay even though the declarant is present in court as a witness. * * *"

None of the cases cited by appellants on page 53 of their brief even remotely support their position that the proffered testimony was not hearsay. The extrajudicial statements of Towle are clearly hearsay *unless they are not offered as assertions to evidence the truth of the matter asserted.*

This of course is the next position taken by appellants—the testimony was not offered to prove the truth of the matter asserted, but only to prove that the statements were in fact made.

It must be borne in mind that both the basic factual issue and the *matter asserted* was that an agency was created in which Norbest was instructed to ship on a sight draft bill of lading basis only.

If the testimony was not offered to prove the truth of the matter asserted, then it was irrelevant. The fact that Towle had conversations with George and Adams or anybody else is not relevant or material to the question of the scope of the agency created. It is only the substance of those conversations that is important, and it is this substance that appellants cannot prove without violating the hearsay rule.

The testimony was obviously offered to show that:

1. Towle told Adams future shipments would be on sight draft;
2. Towle told George to tell Adams that future shipments to the Illinois corporation were to be on sight draft.

It would be difficult to find a clearer example of hearsay. It is abundantly clear that the testimony was offered only to prove that such instructions were given to Norbest or to raise an inference that such instructions were given to Norbest.

This is admitted by appellants for they next argue that the evidence was offered as circumstantial evidence to show the understanding that was reached among the participants in the Salt Lake City meetings. Indeed, on page 56 of their brief, appellants state that the understanding reached among the participants at the Salt Lake City meeting was the fact in issue, "and the nature of instructions given by one and received by two of the participants was a circumstance to establish just what understanding actually was reached." The cases cited by appellants in support of their position (*People v. Fischer,* 49 Cal. 2d 442, 317 P.2d 967 (1957) and *People v. Radley,* 68 Cal. App. 2d 607, 157 P.2d 426 (1945)) clearly do not sustain it.

If, as appellants state, the evidence was offered to show circumstantially what was agreed upon at the meeting of August 10, then it is clear that the evidence is offered to prove the truth of the matter asserted, and, as such, is excludible as hearsay.

Finally, appellants assert that the testimony is admissible, even if hearsay, under the *res gestae* exception to the hearsay rule. The "transaction" referred to in Section 1850 of the California Code of Civil Procedure in the in-

stant case must be the meeting on August 10, 1954, with Mr. Beyers of Norbest, at which the agency agreement was made. Clearly, statements made by Towle to George in the absence of Beyers on August 9, 1954, a full day *before* the "transaction," and by Towle to Adams in the absence of Beyers early in the morning of August 10, some time *before* the "transaction," are not part of the transaction of August 10, 1954.

Again appellants' cases do not even begin to support their position. In *Sethman v. Bulkley,* 9 Cal. 2d 21, 68 P.2d 961 (1937), the court held admissible a letter written *at the same time* that certain deeds were executed. In *Airola v. Gorham,* 56 Cal. App. 2d 42, 133 P.2d 78 (1942), it was held that testimony as to what was said by a person at the time he executed a deed was admissible under the *res gestae* exception. As the court pointed out in *People v. Edwards,* 13 Cal. App. 551, 554, 110 Pac. 342 (1910), the term *"res gestae"* signifies circumstances and declarations *growing out* of the main act which are contemporaneous with it and illustrate its character. This statement immediately raises two objections to appellants' argument in the instant case. These statements neither grow out of (since they were made some time before) nor are they contemporaneous with the main act.

The infirmity in appellants' argument is summarized by the Supreme Court of California's statement in *People v. Wong Ark,* 96 Cal. 125, 128, 30 Pac. 115 (1892), wherein it was held that it was not permissible to introduce, under the guise of *res gestae*, a declaration which is *not the fact talking through the party, but the party's talk about the facts.* The fact here is what instructions were given by appellant to Norbest—not to somebody else. The testimony offered by appellants which was excluded by the trial court is clearly a party's talk about the facts.

Even making the wild assumption that appellants are correct in either of their positions, it has not been shown or indeed argued that appellants were prejudiced by the exclusion of the evidence. It is "hornbook" law that a party must show the respect in which he was prejudiced by the alleged error (*Chase National Bank of New York v. Fidelity and Deposit Co. of Maryland,* 79 F.2d 84, 86 (2d Cir. 1935). Appellants have not done so.

It is an equally undisputed rule of law that the judgment of the trial court will be affirmed in cases in which rulings on evidence, even if erroneous, were not seriously prejudicial. *New York Life Ins. Co. v. Rees,* 19 F.2d 781, 786 (8th Cir. 1927). See also *Stegeman v. Pennsylvania R. Co.,* 6 F.2d 873 (6th Cir. 1925).

In the instant case there is ample evidence, apart from the proffered testimony, to sustain the findings, and the proffered testimony is merely cumulative.

CONCLUSION

Under the applicable law appellants had the burden of proving the scope of the agency agreement between them and Norbest, that Norbest violated its instruction as agent, and that appellants were thereby damaged. This they failed to do in the trial court.

The findings of the trial court that Norbest had authority to ship turkey logs to the Illinois corporation, to invoice the Illinois corporation on open account, and to receive funds from the Illinois corporation to be applied to appellants' account with Norbest are fully sustained by the evidence. They are therefore binding on this Court. It is undisputed that the Illinois corporation refused to pay more than would be required to discharge appellants' debt to Norbest. Consequently no credit ever accrued in favor of appellants.

For these reasons the judgment of the District Court should be affirmed and appellee should be awarded its costs on this appeal.

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EDWARD J. RUFF
IRA A. BROWN, JR.
THELEN, MARRIN, JOHNSON & BRIDGES
111 Sutter Street
San Francisco 4, California
Attorneys for Appellee

HARRY D. PUGSLEY
Continental Bank Building
Salt Lake City 1, Utah
Of Counsel